(1) Supreme Court, U.S.
FILED

991493 JAN 24 2000

OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

RICHARD A. BURGESS Jr.

Petitioner,

v.

G. RAYMOND PELKY, et al.,

Respondent,

On Petition for A Writ Of Certiorari To The District of Columbia Court of Appeals

---

PETITION FOR A WRIT OF CERTIORARI

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64pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the District of Columbia opinion in this case properly tested the disputed amendments to the contract for reasonableness or required the lower court to meet those standards prior to the rendering of a decision.

2. Whether changes to the bylaws to prohibit sub-letting, when the proprietary lease and the by-laws in effect at time of contract permitted sub-letting with the consent of the board of directors, was reasonable and enforceable.

3. Whether changes to the house rules to prohibit the sale or rental of the apartment for two years after its purchase was reasonable and enforceable.

4. Whether the court decided correctly that the forced sale of the shareholders property was proper.

5. Whether the motion for summary judgment granted by the lower court and affirmed by the court of appeals demonstrated the absence of any genuine issue or presented an affirmative defense to all of the issues raised in plaintiff's suit.

6. Whether the court of appeals departed from the usual course of judicial proceedings in this case.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the District of Columbia Court of Appeals as listed in the caption: petitioner, Richard A. Burgess, Jr., plaintiff-appellant below, and respondent, Mr. G. Raymond Pelky and Square 3324 Hampshire Gardens Apartments, Inc., defendant-appellee below.

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2. The decision of the Court of Appeals for the District of Columbia and the sanctioning of the order of the lower court have departed from the accepted course of judicial proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Richard A. Burgess, Jr. petitions for a writ of certiorari to review the judicial procedure and the judgment of the District of Columbia Court of Appeals entered in this case on September 30, 1999.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals affirming the ruling of the Superior Court for the District of Columbia was decided on September 30, 1999 and is reprinted in the appendix ("App.") to this petition. App. 1-14.

The order of the District of Columbia Court of Appeals denying rehearing in this case was entered on October 26, 1999 and is reprinted in the appendix. App. 32.

The order of the Superior Court for the District of Columbia granting summary judgment in favor of G. Raymond Pelkey on all remaining issues and which the District of Columbia Court of Appeals affirmed was entered August 7, 1997, and is reprinted in the appendix to this petition App. 15.

The order of the Superior Court for the District of Columbia denying Plaintiff's motion for

summary judgment was entered August 7, 1997, and is reprinted in the appendix to this petition App. 16.

An earlier decision of the Superior Court for the District of Columbia granting summary judgment in favor of G. Raymond Pelkey under the statute of limitations on all remaining issues was entered December 21, 1995, and that order is reprinted in the appendix to this petition. App. 17-20.

That decision was reversed on appeal by the Court of Appeals for the District of Columbia and the appeal decision is reprinted in the appendix to this petition. App. 21-30.

A prior decision by the Superior Court of the District of Columbia dismissing plaintiff's amended complaint under the statute of limitations was entered on May 5, 1995 and is reprinted in the appendix to this petition. App. 31.

JURISDICTION

The Court of Appeals entered its judgment on September 30, 1999. The petitioner filed a timely response for rehearing, which was denied on October 26, 1999. This Court has jurisdiction to review the judgment of the Court of Appeals under Rule XIII C.

STATUTES INVOLVED

The statutory provisions at issue are all reprinted in the Appendix to this petition:

STATEMENT OF THE CASE

Nature of the Case

This is a breach of contract action in the Superior Court for the District of Columbia by Richard A. Burgess, Jr. for lost rents and other damages resulting from changes to the by-laws and house rules by the Board of Directors (President G. Raymond Pelkey) of Square 3324 Hampshire Gardens Apartments Inc. that prohibited future apartment rentals by Burgess, prohibited the sale or rental of the apartment by subsequent purchasers for

two years after their purchase of an apartment, and forced Burgess to sell his apartment.

January 15, 1974, Burgess and brother-in-law, Earl Froman, submitted applications to purchase apartment G-203 at 222 Farragut St. in the Cooperative apartment complex known as Hampshire Gardens in N.W. Washington D.C. Since the apartment was being purchased as a rental unit, neither party filled in item 7. (names of occupants), as a renter would be sought only after approval by the Board for the purchase of the apartment.

After a meeting with the board, the board approved the purchase of the apartment as a rental unit, a proprietary lease was executed, and a stock certificate was issued to Burgess and Froman on March 19, 1974. Shortly thereafter, the apartment is refurbished and a renter (approved at a meeting with the Board) occupies the apartment.

1979 Burgess purchases brother-in-law's one half interest.

August 1981, Hampshire Gardens announces changes to House Rules prohibiting the rental or sale of an apartment within two years of its purchase. "No rental or resale of an apartment shall be approved by the Board of Directors for two years from the date of purchase."

December 1981, Hampshire Gardens announces changes to by-laws " at least 75% of the apartments must be occupied by the shareholders," later changed to 90%, that they allege empowers them to prohibit future rentals.

April 16, 1984, board meeting approved the exemption of Mr. Raymond Pelky (President of the Board and owner of a rental unit) from the restriction regarding renting.

March, May 1984, Board of Directors announces that it will choose an insurance policy that will include "personal protection of the officers against a suit."

November 13,1984, letter from Pelky sent to Burgess telling him he could not rent the apartment when the present renter moved. The apartment "must be sold because the Board will no longer approve new sub-leases."

The apartment had been occupied by a series of board approved renters from 1974 until the occupant (pre 1984 letter) moved on September 30, 1989, and the board would no longer approve rentals.

November - December 1989, Secretary of board, Harriet Frush, and President of board,

Raymond Pelkey, reiterate to Burgess that new sub-leases will not be approved and apartment must be sold in accordance with letter of October 1984. December 1989, Burgess does not pay Hampshire Gardens monthly maintenance fee.

March 1990, Burgess lists apartment for sale with a real estate agent.

May 1990, one bedroom apartment in same building as Burgess apartment sells for $ 43,000.00.

January 1991, Burgess lists apartment with another real estate agent.

September 1991, Burgess receives letter from Hampshire Gardens to sell apartment or pay the total alleged amount owing by December 1, 1991.

October 1991, Burgess lists apartment with real estate agent E.F. Flynn.

The apartment was sold in January and went to settlement on February 7, 1992. Sale price for apartment is $ 35,000.00 with seller financing of $ 32,000.00. Burgess pays Hampshire Gardens maintenance fees, interest, penalties and charges of $ 5,645.39 as a condition of settlement.

Procedural History

Burgess files a complaint February 6, 1995, followed by an amended complaint March 6, 1995, which added a second defendant, Mr. G. Raymond Pelkey. A motion to dismiss the amended complaint under the statute of limitations was granted because the objection to the motion failed to properly list the authorities in support of the objection, and the motion was granted as being unopposed.

Upon the completion of interrogatories, production of documents and depositions, defendant filed a motion for summary judgment under the statute of limitations, plaintiff filed an opposition to the motion, and on December 21, 1995 the court issued an order granting defendant's motion. A Notice of Appeal of that order was filed on January 23, 1996. A Designation of Record was filed with the Appeals Coordinator's Office and date stamped January 32, 1996. Since the Designation of Record was not received by the Appeals Court after filing, a Motion to accept the Designation was filed April 18, 1996, and approved by order dated May 17, 1996. The Designation of Record was filed with the Appeals Court on June 10, 1996 and briefs were requested and submitted by the parties.

Upon request, the appeal was heard on January 14, 1997. On April 3, 1997 the Court of

Appeals reversed the Superior Court order of December 21, 1995. The case was remanded to the Superior Court and a status conference was held by Judge Satterfield. At the status conference a 30 day period for motions was allocated and Motions for Summary judgment were filed by plaintiff and defendant.

Although oral hearings were requested by both parties, Judge Satterfield decided the case without a hearing August 7, 1997 (docketed August 13, 1997). Plaintiff's Motion for Summary Judgment was denied without comment (see App. 16) and defendant's Motion for Summary Judgment was granted, with costs, "based substantially on the reasons set forth in the defendant's motion." See App. 15.

A Notice of Appeal was filed September 4, 1997 and a Designation of record was filed September 12, 1997. The appeal record fee was paid on November 24, 1997 and the appeal file was delivered to the Court of Appeals that same day. Due to a filing error, the record on appeal appeared not to have been filed and a 10 day notice was mailed to appellant on March 10, 1998. Upon discovery of the error, an order vacating that order and requesting a brief from the appellant was executed on April 14, 1998.

The appellant brief was filed May 20,1998, the appellee brief was filed June 19, 1998 and a reply brief was filed July 10, 1998. The Appeals Court heard the case on January 12, 1999 and decided the case September 30, 1999.

A timely Petition for Rehearing was filed October 14, 1999, which the Court of Appeals for the District of Columbia denied on October 26, 1999. This petition for a writ of Certiorari was then filed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

A review of federal cases found no decisions in opposition to petitioner's position.

The cases cited in support of the appeals court opinion are not appropriate and do not support their decision.

All of the cases cited by the petitioner are appropriate and support his position.

Defendant's motion for summary judgment granted by the Superior Court did not address all of the claims by the petitioner. The motion only addressed the issue of the right of the board to

prohibit the rental of the apartment and will be treated first.

Defendant's motion alleged that the Board had the right under the contract documents to make changes to its provisions to allow the Board to deny sub-leases to stockholders and gave business reasons for making the changes.

Plaintiff's motion for summary judgment and opposition to defendant's motion stated the position that the contract documents allowed for the rental of his apartment with the written consent of the Board and the Board did not have the authority under those documents to prohibit him from renting his apartment. And, if they did deny him the right to rent his apartment, they would have to rent the apartment for him under section 47(2) of the by-laws.

Section 47. (OCCUPANCY) second paragraph.

> Should a stockholder be denied a proprietary lease to a given apartment to which his unit of stock had theretofore been allocated, **or denied the right to let or sub-let** said apartment, the Board shall be required to make every reasonable effort to rent said apartment at a fair and reasonable rental for the account of said stockholder without charge for collection. (Emphasis added).

The appeals court while recognizing section 47(2) made no attempt to interpret the provision and affirmed the granting of defendant's motion for summary judgment while stating:

> Although neither the courts in the District of Columbia nor Delaware, Hampshire Gardens place of Incorporation, have ruled on whether an amendment to a cooperative or condominium instrument that restricts the occupancy or leasing of units in the cooperative or condominium complex can be applied to owners who bought their shares or units before the amendment was adopted, most courts deciding the issue have held that such amendments, once properly adopted, are indeed binding upon earlier buyers.

This decision is in direct conflict with the District Court of Appeal of Florida, Fourth Circuit which held in the case of Buddin v. Golden Bay Manor, Inc. 585 So.2d 435 (Fla. App. 4 Dist. 1991):

> Rule passed by board of cooperative apartment association which prohibited shareholders from sub-leasing their apartments more than one out of three years was inconsistent with proprietary lease and therefore was invalid; proprietary lease gave lessee right to sub-lease subject only to

approval of one-half plus one of stockholders or directors. West's F.S.A. 719.103 (9)(a-c), 719.303.

Action by board of cooperative apartment association which contravenes express provision of governing documents of cooperative or which contravenes right reasonably inferred therein is ultra vires act and must be declared invalid. West's F.S.A. 719.103(9)(a-c), 719.303.

It may be inferred from the lease and the bylaws that permit subletting with the written consent of the board of directors, that renting is possible. It may be equally inferred that such prior consent will not be withheld under any and all circumstances, reasonable or unreasonable. In Buddin and the instant case, the board sent letters stating the board would no longer approve rentals.

The sameness of the facts, circumstances and wording of the contract documents in Buddin and Burgess should have produced the same legal conclusion. In Buddin, the court ruled "this cause is remanded to the trial court with directions to enter summary judgment in favor of the appellant".

Hampshire Gardens wrote the contract documents (Proprietary lease, By-laws, Corporate

Charter, and stock certificate), if it was the intent of the corporation that the board have the right to prohibit sub-letting of the apartments they could have included that power in the contract documents. Nowhere in any of the contract documents is the board granted the power to prohibit the subletting of apartments by shareholders.

The evidence relied on to arrive at the courts decision also conflicts with a decision of the Supreme Court, Appellate Division, Second Department in the case of Ludwig v. 25 Plaza Tenants Corp. 584 N.Y.S.2d 907 (A.D. 2 Dept. 1992):

> Business judgment rule did not apply to actions of the board of directors of cooperative in summarily denying sublease applications when those actions clearly violated express terms of proprietary lease.

The Supreme Court, Appellate Division, First Department also held in Weisner v. 791 Park Avenue Corporation 180 N.Y.S.2d 734:

> The principle that a landlord is under no duty to give consent to a sub-lease and may arbitrarily and unreasonably withhold such consent is not applicable when considering the rights of a proprietary lessee and the owner of

> a cooperative apartment in view of factual and legal distinctions of relationship of landlord and tenant on the one hand and a proprietary lessee and owner of a cooperative apartment on the other.

Indeed, two of the cases cited in the Burgess appeal opinion support petitioner's position, in Winston Towers 200 Assn. V. Saverio, 360 So.2d 470-471 (see also Breene v. Plaza Tower Ass'n 310 N.W.2d 730,735) the District Court of Appeal of Florida affirmed a ruling by the Circuit Court that:

> Amendment to condominium association bylaw providing that all pets, including any pet registered as replacement of a prior pet not registered as of a date one year prior to amendment would not be permitted on the premises, was null and void as an attempt to impose a retroactive regulation.

The ruling allowed Mr. Saverio to keep a dog on the premises that was born more than two years after the registration date cited in the amendment. Hampshire Gardens by-laws section 50 (House Rules) specifically prohibits retroactive changes to the house rules and section 51 (Amendments) specifically prohibits retroactive amendments to the by-laws. Clearly, the right to rent the apartment after

the Hampshire Gardens decision to amend the by-laws and prohibit rentals should also have survived.

Also the Appellate Court of Illinois, First District, Third Division in the case of Logan v. North Lake Shore Drive, Inc. 308 N.E. 278 held that:

> "Where the proprietary lease specifically stated that the shareholder lessee could sublet her apartment, the right to sublet, as limited by a discretionary power vested in the board of directors, was a proprietary right, rather than a matter of discipline, policy or doctrine, and where the application for approval to sublet was denied "in accordance with the long established policy of the building," the shareholder lessee was not required to exhaust internal remedies provided in the lease, and there was a prima facia case that the board's refusal was arbitrary and unreasonable.

These decisions by other Appeal Courts under very similar contracts and very similar circumstances are more appropriate legal precedents than those cited in supporting the conclusion reached by the D.C. Court of Appeals. In the case of Worthinglen Condominium Unit Owners' Ass'n, 566 N.E. 2d at 1275 cited as supporting the conclusion of the court in the Burgess appeal, the appeals court did not

decide the issue but remanded the case to the lower court for a determination of whether the amendment met the reasonable test.

> To determine whether condominium rules and regulations, as well as amendments to declaration are reasonable under surrounding circumstances, trial court must consider whether there is some rational relationship of decision or rule to safety and enjoyment of condominium, whether decision or rule is discriminatory or evenhanded, and whether decision or rule was made in good faith for common welfare of owners and occupants of condominium, including examination of potential hardship as result of amendment and whether rule has been reasonably implemented. We... remand this matter for consideration of the reasonableness of amendment to the declaration, including the retroactive application thereof, in light of the facts and circumstances present at the time the amendment to the declaration was adopted.

In the instant case, neither the order of the lower court or the opinion of the appeals court give any indication as to what, if any, tests were made to determine the reasonableness of the contested amendment. Since there is no contention in defendant's motion for summary judgment that the

amendment prohibiting rentals was reasonable, the lower court's granting of the motion, "based substantially on the reasons set forth in the defendant's motion," could not have made a proper test for the reasonableness of that amendment. Likewise, there is no implication in the Burgess appeals court opinion that there was a test for the reasonableness of any amendments under the criteria of the case the court has cited as an authority. It is the objective of the Worthinglen court that the testing of amendments to condominium documents for reasonableness be of primary and paramount importance and ascertaining a correct answer should be a first step in arriving at a proper decision by the lower court. The Worthinglen appeals court made no judgment on the correctness of the lower court's decision. The appeals court simply would not allow the lower court to take a short cut to their decision by skipping over a reasonableness test of the contested amendment, feeling that a reasonable amendment (properly adopted) for the safety and enjoyment of the condominium members should deserve a second look by the courts. The court ruled that "... if rule, regulation, or amendment is unreasonable, arbitrary, or capricious in those circumstances it is invalid." There have been no cases where the courts have held that an unreasonable, arbitrary, or capricious amendment, even when properly adopted, is valid and enforceable.

I would like to now address the other cause of actions raised by plaintiff in papers before the court that were recognized in defendant's motion for summary judgment under the statute of limitations, that were missing in his motion for summary judgment that is the subject of this petition, and were disposed of in a series of footnotes by the appeals court.

1. Burgess purported that House Rule (# 3) "No rental or resale of an apartment shall be approved by the Board of Directors for two years from the date of purchase" was unreasonable, breached the contract with Burgess, reduced the value of plaintiff's apartment and was an improper use of the house rules. He felt the loss of rental rights for two years and the requirement to hold the apartment for two years before it could be sold reduced its value to prospective purchasers. He also contends that the right to sell as determined by the property owner is a vested right that could not be altered without a mutual contractual agreement, and that the blanket refusal to approve rentals and apartment re-sales for two years after purchase was unreasonable and exceeded the powers granted to the board in the contract documents. Once again, Hampshire Gardens wrote the contract, if it was the intent of the corporation that the board have the right to prohibit sub-letting of apartments and prohibit sales of apartments by shareholders, they would have

included that power in the contract documents. Nowhere in any of the contract documents is the board granted the power to prohibit apartment rentals or prohibit the sales of apartments by shareholders. Buddin, Logan, and Weisner have already been heard from regarding the prohibition of sub-letting and in Weisner the court further held:

> The corporate owner of cooperative apartment building may not under any and all circumstances arbitrarily refuse consent to a proprietary lessee to sale of his lease and stock, but justification for such action would ordinarily present a factual issue.

Also in Johnson v. Keith Mass., 331 N.E.2d 879:

> The Supreme Judicial Court of Massachusetts, Wilkins, J., held that condominium rules and regulations,...could not be treated as a condominium by-law, which could control conduct in the units, but would be treated as rules and regulations which under statute, could govern details of use and operation of common areas and facilities only,... D.C. Code 45-1808.
>
> Where person's right to use his or her property is involved, any ambiguity in asserted restriction such as that contained in a condominium rule, regulation or bylaw should

be construed in favor of freedom of the property from restriction.

The appeals court references Burgess's concerns about the prohibition by the board on the sale of the shareholders stock for two years after purchase as required by rule 3 being unreasonable in footnote 8, (although the court omits the fact that Burgess also challenges the prohibition by the board of apartment rentals for two years after purchase of the apartment as also being unreasonable) and decides it is not unreasonable in footnote 14.

2. Burgess contends that Hampshire Gardens was not entitled to collect maintenance fees for the apartment for the period it was vacant. The actions of the Board of Hampshire Gardens forced the apartment to be vacant and breached the contract with Burgess. Burgess should not have had to pay Hampshire Gardens $ 5,643.39 at settlement. Burgess contends that Hampshire Gardens was aware from the meeting before the board in 1974, through the years the apartment was always rented, that the apartment had been purchased as a rental unit and approved by the board to be used as a rental unit. The board's total refusal to rent the apartment after the tenant moved out in 1989 violated the covenant of quiet enjoyment and Burgess should not have to pay a maintenance fee for the vacant

apartment. Doe v. New Bedford Housing Authority 630 N.E.2d 248 (Mass. 1004).

> Covenant of quiet enjoyment protects tenant's right of freedom from serious interference with his tenancy, acts or omissions that impair character and value of leased premises.

Hais v Smith 547 A. 2d 986,987 (D.C. App. 1988)

> "In every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing,"

The court decided in footnote 14 that Burgess was not entitled to reimbursement of his maintenance fees.

3. Burgess alleged that Hampshire Gardens did not have the authority under the contract to force Burgess to sell his apartment. With the loss of ownership, Burgess sustained the loss of present and future rental income and loss of value from the forced sale of his apartment.

At the time Burgess was told he had to sell his apartment, he was current in the payment of his maintenance fees and was a member in good standing. He discontinued the payment of those fees after several months and resigned himself to the fact that he could not rent his apartment and would have to sell.

The Proprietary Lease is very specific regarding the conditions for the termination of the lease and none of those conditions were present when Burgess was told that he would have to sell his apartment. To allow the board to force the sale of the property under conditions other than those defined in the contract would be an improper enlargement of their powers under the contract. In footnote 15 the court states: "Nor was the Board's forced sale improper..."

It is apparent from the cited footnotes, that the appeals court was aware of the issues raised by Burgess and it also should have been apparent to the court that the defendant's motion for summary judgment was silent in presenting a defense of those issues. At first glance the lower courts decision is simply an order with a hand written notation granting the motion "based substantially on the reasons set forth in the defendant's motion." Since it has no further reference to other cases, cited no evidence, and bears no opinions of its own, an examination of

defendant's motion is necessary. Defendant's motion confines itself to defending its position that the board had the contractual power to change the by-laws to prohibit Burgess from renting his apartment. Superior Court Rule 56 (e) requires that a summary judgment motion demonstrate the absence of any genuine issue or the existence of an affirmative defense against existing issues. Malcolm Price, Inc, v. Sloane, App. D.C., 308 A.2d 779 (1973), aff'd. App. D.C. 339 A.2d 43 (1975).

> One who moves for summary judgment has the burden of demonstrating clearly the absence of any genuine issue of fact and any doubt as to the existence of such an issue is resolved against the movant.
>
> Willis v. Cheek 387 A.2d 718
>
> Summary judgment is an extreme remedy which is appropriate only when there are no material facts in issue and when it is clear that the moving party is entitled to judgment as a matter of law.

Although these claims are referred to when the defendant asks the court to dismiss plaintiff's claims in defendant's motion for summary judgment under the statute of limitations, nowhere in the papers before the court filed after that, does defendant ever allege that the amendment change prohibiting rental

or sale of apartments for two years is reasonable, ever allege that they are entitled to the maintenance fees while the apartment was vacant, ever allege that they are empowered to force the sale of plaintiff's apartment under the circumstances of the case, or offer any evidence to support those contentions. The appeals court while citing no evidence, no contract authority, or precedent case law gratuitously disposes of plaintiff's claims in a series of footnotes to its decision affirming the granting of summary judgment.

It appears that instead of providing oversight for the completeness and correctness of the lower court's decision, the appeals court merely "cleaned up" after the lower court by disposing of the issues not addressed by the defendant's motion for summary judgment by footnotes. The court then affirmed the granting of the summary judgment on the rental prohibition issue defended in defendant's motion. The footnotes do not refer to any presented evidence, any contractual authority, or any precedent case law to confirm the correctness of their decision to dispose of the footnote issues. Those footnote decisions are directly contrary to the dictates of the contract and to the decisions of other courts of appeal in like cases that have been presented in this petition.

CONCLUSION

While the courts have approved amendments to cooperative documents of "reasonable" restrictions and conditions to the rental and sale of apartments under the approval powers of the board of directors, there have been no cases where the courts have held that the absolute prohibition of sales and rentals under that power were reasonable.

The District of Columbia Court of Appeals has entered a decision in its opinion and footnotes in this case that is in direct conflict with the decisions of other United States Courts of Appeal on the same important matters raised in this case. The court's own position is not supported by the cases cited.

It appears the court of appeals has also affirmed the granting of a motion for summary judgment that dismissed all cause of action claims by plaintiff when the motion did not present a defense for all of those claims. The decision by the lower court, the manner in which that decision was reached, and the oversight of that court by the District of Columbia Court of Appeals seems to have departed from the accepted and usual course of judicial proceedings.

Petitioner respectfully requests the court for a review of those proceedings and the judgments rendered in this case.

Respectfully submitted,

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District of Columbia Court of Appeals

No. 97-CV-1473

RICHARD A. BURGESS JR., APPELLANT,

V.

G. RAYMOND PELKEY, *et al.*, APPELLEES.

Appeal from the Superior Court of the
District of Columbia

(Argued January 12, 1999 Decided September 30, 1999)

Before STEADMAN, FARRELL and RUIZ, *Associate Judges.*

RUIZ, *Associate Judge:* Appellant Richard A. Burgess, Jr., challenges the trial court's decision to dismiss his lawsuit on summary judgment asserting that material facts remained in dispute regarding, *inter alia,* whether the Board of Directors of appellee Square 3324 Hampshire Gardens Apartments (Hampshire Gardens),[1] a cooperative association, was in breach of contract when it enforced amendments to the cooperatives

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[1] Appellee G. Raymond Pelkey is the chairman of the board of directors for Hampshire Gardens. Mr. Pelkey was added to this lawsuit in his capacity as chairman by appellant's amended complaint filed March 8,1995, and was originally dismissed from this suit by the trial court's first grant of summary judgment. However, Mr. Pelkey was restored as a co-defendant in this case by this court's decision in *Burgess v. Square 3324 Hampshire Gardens Apartments, Inc.*, 691 A.2d 1153 (D.C. 1997) *(Burgess I),* which reinstated Burgess' breach of contract claims that are the subject of this appeal.

bylaws and house rules which affected certain rights and benefits previously held by appellant when he originally purchased a share in the cooperative. We affirm.

I.

The proprietary lease which Burgess, as lessee, entered into with Hampshire Gardens in 1974[2] permitted the lessee to sublet the apartment upon the approval of the cooperative's Board of Directors.[3] Burgess never personally occupied his one bedroom apartment, and instead, subleased it to a series of tenants from the date of purchase until September 1989. In October 1981, the Board amended the bylaws to require that seventy-five percent of the apartments be occupied by their owners.[4] In October 1983, the Board again raised the owner-occupancy requirement, this time to ninety percent. However, the 1983 amendment also provided that

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[2] The lease was for a term commencing April 1, 1974, and ending on December 31, 2029.

[3] Section 49 of the Hampshire Gardens by-laws also required that all unit owners who wished to sublet their apartments submit to the Board of Directors written applications. In addition, at the time Burgess bought his unit, Section 47 (2) of the by-laws further provided that:

> [s]hould a stockholder be denied a proprietary lease to a given apartment to which his unit of stock had theretofore been allocated, or denied the right to let or sub-let said apartment, the Board shall be required to make every reasonable effort to rent said apartment at a fair and reasonable rental for the account of said stockholder, without charge for collection.

This last provision was later deleted by Board action. See *infra* note 4.

[4] Also sometime in 1981, the Board amended the bylaws to delete paragraph 2 of Section 47. See *supra* note 3.

the Board could "exercise its discretion" and waive the ninety percent occupancy requirement "if it so deems to be necessary." Burgess did not object to any of these amendments and, in fact, did not become aware of them until on or about November 13, 1984, when Burgess received a letter informing him that if his apartment became vacant he would have to sell the unit "because the Board will no longer approve new subleases."

Burgess' last tenant moved out on September 30, 1989, and Burgess put his unit up for sale in March 1990 after being informed by Board members that, as stated in the November 1984 letter, new subleases would no longer be approved. During the spring of 1990, workers repairing the unit damaged the interior of the apartment. The unit was not sold until February 7, 1992, and as a condition for settlement, Burgess was also required to pay Hampshire Gardens $4,575.26 in past due maintenance fees. Burgess subsequently filed a complaint against Hampshire Gardens on February 6, 1995, alleging principally that Hampshire Gardens' 1981 and 1983 amendments to its bylaws breached the terms of his proprietary lease by preventing him from subletting his apartment. Burgess also sought damages for Hampshire Gardens' negligent repair of his apartment during the spring of 1990.

The trial court initially dismissed the suit on summary judgment holding that Burgess' claims had been barred by the three-year statute of limitations for negligence and contract actions, D.C. Code Ann. § 12-301 (1981). We reinstated Burgess' contract claims in *Burgess I*, holding that the proprietary lease qualified as an instrument under seal, and that accordingly, the twelve-year statute of limitations was applicable. *See Burgess I, supra* note 1, 691 A.2d at 1157. Burgess did not, however, challenge the trial court's dismissal of his negligence claim on appeal. *See id.* at 1154 n. 1. On remand, the trial court again dismissed Burgess' remaining contract claims on summary judgment, relying substantially on Hampshire Gardens' motion.

II.

We review a motion for summary judgment by assessing the record independently and viewing it in the light most favorable to the non-moving party. *See Kelley v. Broadmoor Co-op. Apartments*, 676 A.2d 453, 456 (D.C. 1996) (citing *Walton v. District of Columbia*, 670 A.2d 1346, 1353 (D.C. 1996)). The trial court's grant of summary judgment will be affirmed if "there is no genuine issue as to any material fact and.., the moving party is entitled to a judgment as a matter of law." *Holland v. Hannan*, 456 A.2d 807, 814 (D.C. 1983) (quoting Super. Ct. Civ. R. 56 (c)).

A. Claim 1- Entitlement to damages for negligent repairs.

Although the majority of Burgess' breach of contract claims are premised upon the alleged damage to his original ownership rights as caused by the Board's subsequent changes to the bylaws and house rules, Burgess also contends that he is entitled to reimbursement of expenses paid to repair the damages to his apartment caused by negligent Hampshire Gardens workers. In his original complaint, Burgess sought these damages both under a negligence cause of action as well as under a breach of contract claim. Although the trial court originally ruled that his negligence claim was barred by the three-year statute of limitations for such claims, D.C. Code Ann. § 12-301 (3) (1981), which Burgess did not appeal, he now reasserts his entitlement to damages for the negligent repair under the breach of contract claim, relying on Article 4 of the proprietary lease which provides that Hampshire Gardens sh~~all be~~ liable for losses or damages caused to a lessee's unit if the damage "shall have been caused by negligence on the

part of the lessor."[5] We reject appellant's argument because we conclude that his breach of contract claim for damages caused by negligent repair is "completely dependent upon and intertwined with" his negligence claim for the same injury. *Morton v. Nat'l Med. Enter., Inc.*, 725 A.2d 462, 471 (D.C. 1999).

"It is well settled that in a determination of the applicable statute of limitations, the plaintiffs characterization of the claim is not controlling," *Saunders v. Nemati*, 580 A.2d 660, 661 (D.C. 1990), and "we must look beyond the conclusory terms of the pleadings to the substantive elements of any alleged causes of action." *McCracken v. Walls-Kaufman*, 717 A.2d 346, 350 (D.C. 1998). In other words, the fact that Burgess now seeks damages for Hampshire Gardens' faulty repair of his premises under a breach of contract theory is not by itself dispositive of the statute of limitations issue. While Article 4 of the proprietary lease does provide that Hampshire Gardens shall be liable for losses or damages caused to the lessee's unit if the damage "shall have been caused by negligence on the part of the lessor," the provision does not impose a new duty on the part of Hampshire Gardens as it already had a common-law obligation to perform any repairs it might make on the property in a non-negligent manner.[6] *Cf. Etheredge v. District of Columbia*, 635 A.2d 908, 918 (D.C. 1993) (same

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[5] Given our disposition of the negligence claim, we need not address Hampshire Gardens' alternative arguments based on the doctrines of *res judicata* and law of the case.

[6] Article 4 imposes a duty on the cooperative to keep the apartment building and grounds in good repair, but provides that in doing so, the cooperative "shall not be liable for.. . any loss, cost, damage or injury which may be sustained by the Lessee, the members of his family, guests, invitees, servants or agents unless the same shall have been caused by negligence on the part of the Lessor." In this sense, the clause has the characteristics of a limitation on liability rather than an assumption thereof.

course of conduct may support both a claim of assault and battery and a negligence claim as long as the defendant, while engaging in the conduct that included the intentional tort, was also in breach of another recognized duty owed to the plaintiff). *See also Walls-Kaufman*, 717 A.2d at 351 (same). Thus, although Burgess' claim also may be presented as a breach of contract cause of action, it is nevertheless Hampshire Gardens' underlying negligence which is the basis for the alleged breach of contract. *See id.* at 350. Accordingly, Burgess may not circumvent the three-year statute of limitations for a negligence action by seeking damages for the identical injury under a breach of contract claim. *See Saunders*, 580 A.2d at 661 ("The action thus pleaded cannot.., be removed from its place in the law of torts by calling what occurred also [a breach of contract].") (quoting *Morfessis v. Baum*, 108 U.S. App. D.C. 303, 305, 281 F.2d 938, 940 (1960)).

B. All other claims.

Burgess' remaining claims all stem from the Board's decisions from 1981 to 1983 to amend its bylaws and house rules. Burgess contends that in amending the bylaws to require a higher unit occupancy rate by shareholders, the Board breached the terms of his proprietary lease because the new bylaws prevented him from subletting his condominium unit, a right which he originally enjoyed when he purchased his share in the cooperative. Although Burgess does not challenge the procedures followed by the Board in enacting the amendments, he relies on language in Sections 50 and 51 of the bylaws which provide collectively that no house rules or regulations nor bylaws shall be made "retroactive." [7]

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[7] Section 50 provides:

> The Board of Directors shall have and exercise the power to prescribe and publish rules and regulations for the government

(continued...)

Accordingly, Burgess contends that the Board should not have refused to permit him to sublet his apartment or, once it did so, that it was required by pre-amendment Section 47 (2) to make "reasonable efforts" to rent the apartment out on his behalf. In declining to do either, Burgess argues that the Board was in breach of contract.[8] Under Hampshire Gardens'[7] interpretation of the meaning of the term "retroactive," however, the changes in the rules and bylaws did not violate either Section 50 or 51 of the bylaws because existing subtenants were not asked to vacate their apartments until their subleases had expired and hence, the amendments were applied prospectively to future efforts to sublease, with notice of the restriction. We agree with Hampshire Gardens' interpretation and reject appellant's argument.

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[7](...continued)

> and management of the corporate property, and to alter, amend, repeal or add to the same, from time to time, and any change in said rules and regulations shall be published at least five (5) days before the date when such change shall take effect, provided always, that *no rules or regulations shall be made retroactive.*

(Emphasis added.)

> Section 51 states in pertinent part:
> In all cases where by-laws are changed by the Board, notice of such change shall be sent to each stockholder at least fifteen (15) days before the date when such change shall take effect, provided always, that *no change in these by-laws* made by the stockholders or the Board of Directors *shall be retroactive.*

(Emphasis added.)

[8] Burgess also challenges the Board's amendment of a house rule to restrict transfer of the right to occupy an apartment for two years from the date of acquiring such right on the ground that such restriction impairs the value of his interest in the cooperative.

The cooperative instruments, which include the bylaws and sales agreement, constitute a contract governing the legal relationship between the cooperative association and the unit owners. *See Johnson v. Fairfax Village Condo IV Unit Owners Ass'n*, 548 A.2d 87, 91 (D.C. 1988); 15A AM. JUR. 2D *Condominium and Co-Operative Apartments* § 79 (1976). A purchaser of a unit in a condominium[9]

> voluntarily submits himself to the condominium form of property ownership, which requires each owner to "give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property. Condominium unit owners comprise a little democratic sub society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization."

Worthinglen Condominium Unit Owners' Ass'n v. Brown, 566 N.E.2d 1275, 1277 (Ohio Ct. App. 1989) (quoting *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 181-82 (Fla. Dist. Ct. App. 1975)); *see also Johnson v. Hobson*, 505 A.2d 1313, 1317 (D.C. 1986). "Potential purchasers of condominium units should thus realize that the regime in existence at the time of purchase may not continue indefinitely and that changes in the declaration may take the form of restrictions on the unit owner's use of his property." *Worthinglen Condominium Unit Owners' Ass'n*, 566 N.E.2d at 1277. As the cooperative form of ownership

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[9] A condominium differs from a cooperative in that a condominium owner has "a fee interest in the apartment where he or she resides" whereas "[a] cooperative property owner holds shares of stock in the cooperative corporation that owns the apartment." *Lemp v. Keto*, 678 A.2d 1010, 1018 (D.C. 1996). The corporation leases apartments to its stockholders.

is more restrictive than that of a condominium,[10] it follows that a stockholder in a cooperative is no less subject to the private regime established by the association.

Although neither the courts in the District of Columbia nor Delaware, Hampshire Gardens' place of incorporation," have ruled on whether an amendment to a cooperative or condominium instrument that restricts the occupancy or leasing of units in the cooperative or condominium complex can be applied to owners who bought their shares or units before the amendment was adopted, most courts deciding the issue have held that such amendments, once properly adopted, are indeed binding upon earlier buyers. *See Ritchey v. Villa Nueva Condominium Ass'n*, 146 Cal. Rptr. 695, 699 (Cal. Dist. Ct. App. 1978); *Flagkr Fed. Sav. and Loan Ass'n v. Crestview Towers Condominium Ass'n*, 595 So. 2d 198, 200 (Fla. Dist. Ct. App. 1992) (amendment to recorded Declaration of Condominium); *Breezy Point Holiday Harbor Lodge -- Beachside Apartment Owners' Ass'n v. B.P. Partnership*, 531 N.W.2d 917, 920 (Minn. Ct. App. 1995); *McElveen-Hunter v. Fountain Manor Ass'n*, 386 S.E.2d 435, 436 (N.C. Ct. App. 1989); *Worthinglen Condominium Unit Owners' Ass'n*, 566 N.E.2d at 1279; *Bd. of Dir. of By the Sea Council of Co-Owners, Inc. v. Sondock*, 644 S.W.2d 774, 781

[10] *See generally* 15A AM. JUR. 2D *Condominiums and Co-Operative Apartments, supra*, at § 5; 8 RICHARD R. POWELL & PATRICK J. ROHAN, POWELL ON REAL PROPERTY § 54A.01[6], at 54A-17 to 54A-18 (1999).

[11] In addition to being bound by the regime established in the cooperative's instruments, shareholders are subject to the law of the state under which the corporation is formed. *See Kelley*, 676 A2d at 459 (citing D.C. Code Ann. § 29-1141 (1981)). The Delaware statutory law provides that "[e]ach unit owner shall comply with the code of regulations and with such rules governing the details of the use and operation of the property ... *as may be in effect from time to time.*" Del. Code Ann. tit. 25, § 2209 (1998) (emphasis added).

(Tex. App. 1982); *Shorewood West Condominium Ass'n v. Sadri*, 966 P.2d 372, 376 (Wash. Ct. App. 1998). *But see Winston Towers 200 Ass'n, v. Saverio*, 360 So. 2d 470, 470-71 (Fla. Dist. Ct. App. 1978) (amendment to condominium association bylaws); *Breene v. Plaza Tower Ass'n*, 310 N.W.2d 730, 735 (N.D. 1981).[12] We adopt this view. To hold otherwise would negate uniformity, a principal purpose of cooperative and condominium living arrangements, by creating disparity among units subjected to differing regulatory regimes. *See Worthinglen Condominium Unit Owners' Ass'n*, 566 N.E.2d at 1279 (noting that a principal purpose of condominium rules and regulations is to create uniform living conditions for unit owners). The potential for gross disparity in regulatory regimes over an extended period of time is underscored in this case where Burgess originally signed a proprietary lease which entitled him to the right of occupancy of his unit until December 31, 2029. Thus, under Burgess' interpretation of the term "retroactive," Hampshire Gardens would not be able to apply any amendments adopted subsequent to his entry into the cooperative until his lease expired in 2029.

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[12] Burgess relies on *Breene* for his proposition that an anamendment to a condominium declaration which prohibited the sublease of a unit to a nonowner except in specific situations cannot be applied retroactively to individuals who had purchased their units prior to the amendment. However, in *Breene*, the Supreme Court of North Dakota was bound by a state statute which required that the declaration of condominium, use restrictions and bylaws be first recorded in the office of the register of deeds in order for them to be effective as against prospective buyers. See Breene, 210 N.W.2d at 733-34. Neither D.C. nor Delaware has a similar statutory provision. *Cf. Townhouse III Condominium Ass'n v. Mulligan*, No. CV-92-50183-S, 1995 Conn. Super. LEXIS 749, at *12 (Conn. Super. Ct. March 13, 1995) (holding that it would not follow *Breene* because Connecticut does not have a similar statutory provision). *See also Worthinglen Condominium Owners Ass'n*, 566 N.E.2d at 1279 n.3 (rejecting *Breene* even though "Ohio's condominium statutes, like North Dakota's, require condominium owners to record property restrictions").

Such a result would create an undesirable Balkanization of regulatory regimes among the different units within the same cooperative community. We emphasize again that the amendments adopted limited only the right to sublease in the future and did not affect existing subleases.

We also are satisfied that Burgess had sufficient notice before he bought his stock in the cooperative that he would be bound by subsequent changes to the cooperative instruments. *See McElveen-Hunter*, 386 S.E.2d at 436. Burgess' original application at the time he purchased his cooperative share provided in paragraph 8 that Burgess agreed to "abide by and conform with the By-Laws, House rules and regulations *in force during the occupancy*." (Emphasis added). In addition, paragraph 26 of the proprietary lease stated that the lease was subject to:

> the provisions of the certificate of incorporation, the by-laws *(now existing or hereafter adopted)* and the rules and regulations *(now existing or hereafter established)* of the Lessor Corporation.

(Emphasis added.) Finally, Article 11 (E) of the Certificate of Incorporation provides that all certificates of stock issued by Hampshire Gardens would be subject to the Certificate's provisions as well as any bylaws "now existing and hereafter adopted" by the cooperative. *See also* Del. Code Ann. tit. 25, § 2209, *supra* note 11. It is therefore clear that Burgess was on notice at the time of purchase of the possibility that his rights in the cooperative could be affected by subsequent changes in the cooperative's bylaws and house rules.

Thus, provided that the amended bylaws were enacted according to proper procedures, the grant of summary judgment by the trial court is appropriate so long as the rules come within the authority of the Board as provided in the cooperative's governing instruments. *See Kelley*,

676 A.2d at 459;[13] *Johnson*, 505 A.2d at 1317. Burgess does not challenge the procedures pursuant to which the amendments were adopted, nor does he generally contend that, in adopting the requirement of owner occupancy, the Board acted without authority. Rather, Burgess' complaint is that the requirement should not have applied in his case. In its motion for summary judgment, Hampshire Gardens provided an affidavit from Mr. Raymond Pelkey, the Chairman of the Board of Directors of Hampshire Gardens, explaining the purposes of the stricter unit occupancy bylaws:

> First and foremost, it was the Board's judgment that the mutual and cooperative objects of the corporation were best served if the apartments were occupied by shareholders of the corporation rather than by subtenants. This was deemed to be in the best interests of the shareholders.

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[13] In *Kelley*, we looked to Delaware law and applied the "business judgment rule" to determine the validity of a Board's action where the cooperative was incorporated in the state of Delaware, as Hampshire Gardens is in this case. We noted that under Delaware law, "we look first to the bylaws to determine the validity of the Board's actions." *See Kelley*, 676 A. 2d at 459 (citing *Hibbert v. Hollywood Park, Inc.*, 457 A. 2d 339, 343 (Del. 1983)). In interpreting bylaws which required the Board's actions to be "lawfull' and "appropriate," we stated that in the context of the cooperative contract and bylaws, "appropriate" meant "reasonable" and accordingly, reviewed a surcharge imposed on rentals to determine whether it was "reasonable." Here, the Board of Directors for Hampshire Gardens was similarly authorized to take any action "which the Board in its discretion shall deem needful, advisable or proper for the preservation, management, conduct and operation of the property, affairs and business of the Corporation, and to make and enforce all needful rules and regulations for that purpose. We need not explore further any subtleties of interpretation and deference that might relate to the business judgment rule and the grant of discretion to the Board to determine the need, advisability or propriety of particular by-laws.

> Further, in order to qualify for advantageous property tax credits, a bare minimum of at least 50% of the apartments were required under D.C. law to be occupied by shareholders. Even this bare minimum was too low, however, to satisfy the lending criteria of financial institutions who placed loans for both the cooperative and the purchase of individual units. These lenders will not extend financing if less than 70% to 80% of the units are owner-occupied.

Burgess has not presented any affidavits or Board minutes either rebutting Pelkey's representation or substantiating Burgess' own broad allegations of "losses and damages from lost rents, repair costs, reduced property value from a forced sale, . . . and charges improperly deducted from his sale proceeds at settlement." *See Kelley*, 676 A.2d at 461.

Under analogous circumstances in *Kelley*, we concluded that similar justifications proffered by the president of the cooperative's housing association provided a basis for a rental surcharge which the appellant failed to rebut with evidence of any particularized losses which she claimed to have suffered from the subjective and discriminatory imposition of the surcharge. *See id.* In this case, Burgess has not made an adequate showing that the cooperative's rules have "an unfair or disproportionate impact on only certain unit owners." *Johnson*, 505 A.2d at 1318. Although he did present minutes from an April 16, 1984, board meeting showing that Pelkey had asked for and received permission to sublet a second apartment for as long as Pelkey continued to live in the complex, Burgess has not shown that he was unfairly treated because he never requested a waiver of the rule on his own behalf, and he never occupied a unit at Hampshire Gardens. Nor did Burgess ever raise any objections or express his concerns to the Board when it adopted the limitations on subletting.

On the record before us, we cannot say that the Board's amendments to the bylaws and house rules changing the owner-occupancy requirement are unreasonable, subjective or discriminatory.[14] Therefore, as there are no material issues of fact in dispute and, as a matter of law, Hampshire Gardens is entitled to summary judgment on the issues presented,[15] we affirm the judgment of the trial court.

Affirmed.

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[14] Nor is the Board's amendment to the house rules imposing a two-year residency requirement on prospective owners from the date of sale unreasonable. See *supra* note 8.

[15] Because we have decided that Hampshire Gardens did not breach its contract with Burgess, it follows that Burgess was not entitled to reimbursement of his maintenance fees. Nor was the Board's "forced" sale improper, as under Section 40 (D) of the bylaws, the Board is entitled to demand and receive a stockholder's certificate of stock which may be subsequently sold in the event that the stockholder is more than 20 days in default of fees owed.

IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

RICHARD A. BURGESS, JR.

Plaintiff

vs.

SQUARE 3324 HAMPSHIRE
GARDENS APARTMENTS, INC.

Defendant : Civil No. 95-000979

ORDER 1 of 2
(Filed August 13, 1997)

Upon due consideration of the Motion for Summary Judgment filed herein by defendant Square 3324 Hampshire Gardens Apartments, Inc., and any opposition thereto, it is this 7th day of August, 1997, by the Superior Court for the District of Columbia,

ORDERED, that the Motion for Summary Judgment be, and is hereby, GRANTED, *based substantially on the reasons set forth in the defendant's motion*, it is further

ORDERED, that judgment be, and is hereby, entered in favor of the defendant and against the plaintiff for costs.

"s/ Lee Satterfield"
Judge

IN THE SUPERIOR COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

RICHARD A. BURGESS, JR.

Plaintiff

vs.

SQUARE 3324 HAMPSHIRE
GARDENS APARTMENTS, INC.

Defendant : Civil No. 95-000979

ORDER 2 of 2
(Filed August 13, 1997)

Upon due consideration of Plaintiff Richard A. Burgess, Jr.'s Motion for Summary Judgment and Defendant Square 3324 Hampshire Gardens Apartments, Inc.'s opposition filed herein, it is this 7th day of August, 1997, by the Superior Court for the District of Columbia, hereby,

ORDERED, that the plaintiff's Motion for Summary Judgment, be and is hereby, DENIED.

"s/ Lee Satterfield"
Judge

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
Civil Division

RICHARD A. BURGESS, JR. Plaintiff

vs.

SQUARE 3324 HAMPSHIRE
GARDENS APARTMENTS, INC. Defendant

: Civil No. 95-000979

ORDER GRANTING SUMMARY JUDGMENT

(Filed December 22, 1995)

This matter is before the Court on Defendant's Motion for Summary Judgment, Plaintiff's Opposition, and Defendants' Reply. For the reasons set forth herein, the Court will grant Defendants' motion and enter judgment as a matter of law for Defendants on all counts of Plaintiff's complaint as they are barred by applicable statutes of limitation.

This case arises from allegations by Plaintiff, both a former owner of an apartment unit and stockholder in Defendants' corporation, about events over three years old. While the apartment itself was leased by both Plaintiff and another individual, Plaintiff purchased this individual's interest in 1979 and became the sole owner of the unit. Neither of the two men ever resided at the apartment. Rather, it was subleased to other tenants by Plaintiff. In 1981, the Board of Directors of the Defendant-apartments revised its By-laws to reflect a desire that at least 75% of the apartment units be occupied by the shareholders

themselves, later increasing this percentage to 90% by subsequent By-Law amendment.

Plaintiff admits that he was aware of the decision and policy of the Board in 1984. Moreover, the tenant of Plaintiff was permitted to stay in the unit until September 30, 1989. At this time, knowing that another sublease would not be permitted, Plaintiff placed the unit on the market for sale. After almost two and one-half years, the unit was sold. The instant suit alleges (1) that the Board's revision of the By-Laws was a breach of contract (proprietary lease) which caused Plaintiff to suffer damages; (2) that defendants' agents made negligent repairs to Plaintiff's unit in 1990, again causing Plaintiff to incur damages.[1]

Defendants assert in their motion that all of Plaintiff's claims are barred by the statute of limitations. Plaintiff contends that his claims are based on the proprietary lease, which he claims is a sealed document, thus requiring a twelve year statute of limitations. Plaintiff also contends that the decision to sell his unit was made under duress and that this duress continued until the sale. Therefore, he states that the continuing tort doctrine applies to commence the statute at the time the duress ended, namely the sale of the apartment. This Court is not persuaded by either of Plaintiff's arguments. Because there are no material facts in dispute in this case other than which statute of limitations applies, summary judgment is appropriate. Clyburn v. 1411 K Street Limited Partnership, 628 A.2d 1015, 1017 (D.C. 1993).

[1] Plaintiff's complaint and amended complaint alleges three counts: liability, breach of contract and negligence. However, all three counts do no more than reiterate the two allegations set forth above under different titles.

D.C. Code 12-301(7) (1981) states that actions on simple contracts, under which fall the majority of housing leases, is three years. Also, claims for damages caused to Plaintiff's unit as the result of negligent repairs would also be subject to a three year statute, whether brought under the terms of the lease or through a separate claim for negligence. Id.; D.C. Code 12-301 (3), (8) (1981). D.C. Code 12-301 (6) governs instruments under seal, providing a twelve year statute of limitations.

Where an injury can be or is able to be determined, the statute of limitations begins to run at the time the injury occurs. Colbert v.Georgetown University, 641 A.2d 469, 472 (D.C. 1984); Burns v. Bell, 409 A.2d 614, 615 (D.C. 1979). Plaintiff, by his own admission was aware of the changes in the corporate By-Laws in 1984 and knew at that time that no additional sublease would be honored. As for the alleged damage caused by the Defendants' repairmen, there is no question that the statute began to run at the time the apartment was damaged, in this case 1990.It appears, that the instant suit, filed February 6, 1995, runs afoul of the three year statute of limitations.

Plaintiff asserts that the proprietary lease was a document under seal, thus requiring a twelve year statute of limitations. An examination of the lease in this case reveals merely that Plaintiff signed his name next to a pre-printed word "seal". There is no evidence that this simple contract was a sealed instrument.

The District of Columbia Court of Appeals has recently commented on the issue of whether a signature next to a preprinted word "Seal" operates as Plaintiff contends. In Huntley v. Bortolussi, No. 93-CV-1341 (D.C. December 7, 1995), the Court refused to apply the twelve year statute of for sealed instruments, stating;

> Courts have been reluctant to declare a document to be sealed in the absence of evidence that the parties intended it to be under seal. Even the appearance of the word "Seal" on a document has been held insufficient to create a sealed instrument.

Id., slip op. At 7; President and Directors of Georgetown College v. Madden, 505 F. Supp. 557, 587, aff'd 660 F.2d 91,96 (4th Cir. 1981).

Plaintiff offers no evidence that the parties intended the subject lease to be under seal. Therefore, Plaintiff's claims are governed by the three year statute of limitations and are barred by the statute.

Accordingly, it is by this Court this 21st day of December, 1995, hereby;

ORDERED, that Defendants' motion is GRANTED. It is further

ORDERED, that judgment be entered as a matter of law in favor of Defendant.

"s/ Mary Ellen Abrecht"
Judge

District of Columbia Court of Appeals

No. 96-C V-117

RICHARD A. BURGESS, APPELLANT,

V.

SQUARE 3324 HAMPSHIRE GARDENS APARTMENTS,

INC., APPELLEE.

Appeal from the Superior Court of the District of Columbia

(Argued January 14, 1997 Decided April 3, 1997)

Before FERREN, STEADMAN, and REID, *Assoc. Judges.*

STEADMAN, Associate Judge: The only issue in this appeal is whether the proprietary lease between appellant Richard Burgess and appellee Square 3324 Hampshire Gardens Apartments, Inc. ("Hampshire Gardens"), a housing co-operative, is an "instrument under seal" within the meaning of D.C. Code § 12-301(6) (1995), thereby entitling Burgess to a twelve-year statute of limitations on his breach of contract claim. Because the trial court erred in concluding that the proprietary lease was not an "instrument under seal" for § 12-301(6) purposes, we reverse.

I.

The proprietary lease at issue is a four-page printed document entered into by the parties on March 19, 1974. After

reciting the substantive provisions of the agreement, the lease concludes with the following attestation clause:

> IN WITNESS WHEREOF, on the day and year first hereinbefore written, SQUARE 3324 HAMPSHIRE GARDENS APARTMENTS, INC., has caused these presents to be signed in its corporate name by its President and its corporate seal to be hereunto affixed, attested by its Secretary and the Lessee has hereunto set his hand and seal.

Following this clause are the signatures of the then President and Secretary of Hampshire Gardens and the signature of Burgess. Following Burgess' signature the word "Seal" appears in parenthesis. Although we cannot tell from the copy of the lease provided to this court whether the corporate seal was actually affixed to the lease, both of the parties assert in their briefs on appeal that it was, and for purposes of this appeal we assume that to be the case.

Because a provision of the lease allowed the lessee to sublet an apartment with the approval of the co-operative's Board of Directors, Burgess never occupied his one bedroom apartment, but instead subleased it to a series of tenants from the date of purchase until September 1989. In October 1981, the Board amended the co-operative's bylaws to require that seventy-five percent of the apartments be occupied by their owners. In October 1983, the Board again amended the bylaws, this time raising the owner occupancy requirement to ninety percent. Burgess admittedly became aware of these amendments sometime in 1984. Because it was Burgess' understanding that the Board would not approve a new sublessee following the departure of his last tenant, in September 1989 Burgess placed his apartment on the market, and ultimately sold it on February 7, 1992.

On February 6, 1995 Burgess filed this pro se lawsuit alleging that Hampshire Gardens' 1981 and 1983 amendments to the bylaws breached the proprietary lease.[1] Following discovery, Hampshire Gardens moved for summary judgment on the ground that Burgess' claim was barred by the three year statute of limitations for contract actions contained in D.C. Code § 12-301(7) (1995). Burgess opposed summary judgment, asserting that the proprietary lease was an "instrument under seal" within the meaning of D.C. Code § 12-301(6) (1995), and that the applicable statute of limitations was therefore twelve years instead of three. The trial court granted summary judgment holding that Burgess had "offer[ed] no evidence that the parties intended the subject lease to be under seal," and this appeal followed.

II.

In the District of Columbia, the statute of limitations for contract actions is three years, while the statute of limitations for actions brought on sealed instruments is twelve years. D.C. Code § 12-301(6), (7) (1995); *Doolin v. Environmental Power Ltd.*, 360 A.2d 493, 495 n.2 (D.C. 1976); *Ramey v. Burrascano*, 324 A.2d 687, 687 (D.C. 1974) (per curiam).[2] In

[1] Burgess also alleged that Hampshire Gardens damaged his apartment by failing to make necessary repairs and negligently making repairs in the spring of 1990. The trial court granted Hampshire Gardens' motion for summary judgment on this claim holding that it was barred by the applicable three year statute of limitations, D.C. Code § 12-301(3) (1995). Burgess does not challenge this ruling on appeal.

[2] The statute provides in relevant part:

(Footnote continued on next page.)

this appeal the parties do not dispute that the cause of action accrued when Burgess first learned of the bylaw amendments in 1984. Thus, the viability of this lawsuit based on an alleged breach of the proprietary lease turns on whether the three year statute of limitations for breach of contract or the more generous twelve year statute of limitations for sealed instruments applies.

In its order granting summary judgment for Hampshire Gardens, the trial court relied almost exclusively on our recent decision in *Huntley v. Bortolussi*, 667 A.2d 1362 (D.C. 1995). There we considered whether a suit brought on an unsealed promissory note acknowledged in and secured by a contemporaneously executed and sealed deed of trust constituted an action on "an instrument under seal" for § 12-301(6) purposes. Id. at 1362-63. We held that the twelve year statute of limitations did not apply because the promissory note and a subsequent extension were not under seal, and the sealed deed of trust did not contain "an independent undertaking or covenant to pay the indebtedness." *Id.* at 1364-65. By way of closing we noted that

[2] (Continued)

Except as otherwise specifically provided by law, actions for the following purposes may not be brought after the expiration of the period specified below from the time the right to maintain the action accrues: (6) on an executor's or administrator's bond — 5 years; on any other bond or single bill, covenant, or other instrument under seal — 12 years; (7) on a simple contract, express or implied —3 years; D.C. Code § 12-301 (1995).

> [c]ourts have been reluctant to declare a document to be sealed in the absence of evidence that the parties intended it to be under seal. Even the appearance of the word "seal" and the impression of the corporate seal on a document has been held insufficient to create a sealed document. See *President and Directors of Georgetown College v. Madden*, 505 F. Supp. 557, 587 [(D. Md. 1980)], aff'd, 660 F.2d 91, 96 (4th Cir. 1981) [(per curiam)]. Here there is no seal on the note or the extension document. Moreover, the record contains no evidence that the parties intended the note or the extension of the note to be a sealed instrument.

Id. at 1365. Although this discussion was not necessary to the result in *Huntley*, and is therefore technically dicta, see *Umana v. Swidler & Berlin, Chartered*, 669 A.2d 717, 720 n.9 (D.C. 1995), it is an accurate statement of the law. *Madden*, the case cited in *Huntley*, did indeed hold that the appearance of the word "seal" and the impression of corporate seals on a document was insufficient to create a sealed instrument, *Madden*, supra, 505 F. Supp. at 587, but the facts of *Madden* are significantly different from those here.

In *Madden* the document at issue was a construction contract between two corporate entities. *Id.* at 581-82. The only indication that the contract was intended to be under seal was the presence of "(Seal)" above the signatures of the corporate officers and the impression of two corporate seals. *Id.* at 582-83 & n.49. Because the court and parties disagreed over whether District of Columbia or Maryland law governed, id. at 581, the court conducted an extensive survey of both District of Columbia and Maryland caselaw as well as a number of secondary sources, *id.* at 581-87. The court concluded:

> While no case appears to have decided the question of whether, for purposes of determining the applicable limitations period, the use of the word "(Seal)" together with the impression of corporate seals makes a contract a sealed instrument, in the absence of a clause in the body of the contract regarding the sealed nature of the contract, it would appear that such combined use of the word "(Seal)" and of such impressions should be considered insufficient by themselves to manifest an intent to render the contract under seal, particularly where such use of the word and of such impressions would serve no purpose other than to extend the statute of limitations.

Id. at 587 (emphasis added).

It was on the basis of *Huntley* and *Madden* that the trial court concluded that because Burgess "merely.., signed his name next to a preprinted word 'Seal'" and offered "no evidence that the parties intended the subject lease to be under seal" the lease was not an instrument under seal and the twelve year statute of limitations was inapplicable. However, in so doing the trial court overlooked a number of cases binding in this jurisdiction under *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971) that are distinguishable from the facts of *Huntley* and *Madden* and controlling on the facts of this case.

It is true that the presence of a corporate seal may not by itself make a document an instrument under seal for § 12-301(6) purposes. *Simonson v. International Bank of Washington*, 114 U.S. App. D.C. 160, 160, 312 F.2d 887, 887 (1963) (per curiam); *Sigler v. Mount Vernon Bottling Co.*, 158 F. Supp. 234, 235-36 (D.D.C.), aff'd, 104 U.S. App. D.C. 260, 261-62, 261 F.2d 378, 379-80 (1958) (per curiam). See also *A.I. Trade Fin., Inc. v. Petra Int'l Banking*

Corp., 314 U.S. App. D.C. 122, 135, 62 F.3d 1454, 1467 (1995); *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., Inc.*, 147 U.S. App. D.C. 14, 25 n.68, 452 F.2d 1346, 1357 n.68 (1971). That is the case because corporate seals are routinely employed "for identification and as a mark of genuineness," a use which does not necessarily evince an intention to create an instrument under seal. *Sigler*, supra, 158 F. Supp. at 236, 104 U.S. App. D.C. at 262, 261 F.2d at 380. See also *Fox-Greenwald*, supra, 147 U.S. App. D.C. at 25 n.68, 452 F.2d at 1357 n.68. Thus, in order for a document to be an instrument under seal for statute of limitations purposes, something more than a corporate seal, such as, for example, a recitation that the document is "signed and sealed," is required. See *Sigler*, supra, 158 F. Supp. at 235-36, 104 U.S. App. D.C. at 261-62, 261 F.2d at 380. See also *A.I. Trade*, supra, 314 U.S. App. D.C. at 135, 62 F.3d at 1467.

This is precisely what is present in the case before us. The proprietary lease here contains an extensive attestation clause, quoted above, which expressly states that in witness of the document, the parties are, on the part of the corporation, affixing its corporate seal, and, on the part of the lessee, setting his hand and seal. Furthermore, the document at issue is a formal, printed document, headed in Gothic letters "Hampshire Gardens" and "Proprietary Lease," and governing a major legal transaction; viz., the lease of real property for an initial term of 55 years and renewable by the lessee for successive terms of 100 years.

There is no requirement that proof of the parties' intent to create a sealed instrument be proved by extrinsic evidence. Our precedent is quite to the contrary. In *Harrod v. Kelly Adjustment Co.*, 179 A.2d 431, 432 (D.C. 1962) the appellant sought to avoid the twelve year statute of

limitations on a contract for the sale of a watch by claiming ignorance of the effect of a sealed instrument. There the contract prominently stated "witness my hand and seal" and the word "seal" in parenthesis appeared opposite the signature. *Id.* The court rejected his argument holding that

> (a)ppellant's ignorance of the seal's significance and his avowed lack of actual intent to execute an agreement of such dignity do not determine the character of the instrument; whatever reservations he may have had then are unavailing now. In deciding the issue the court is concerned not with a maker's undisclosed intent but with that expressed or manifested on the paper under examination. And as the word "seal" in parenthesis is in common use as a seal, its presence upon an instrument in the usual place of a seal, opposite the signature, undoubtedly evinces an intention to make the instrument a sealed instrument, which should be held conclusive by the court, in the absence of other indications to the contrary appearing on the face of the instrument itself.

Id. Thus, a proper determination of whether a document is under seal is limited in the first instance to an examination of the face of the document itself. *Id.* See also Sigler, supra, 158 F. Supp. at 235 ("Where a seal is used the intention of the maker is controlling and is to be determined by the Court from an examination of the instrument itself.").

Indeed, in the case of an individual, in contrast to a corporation, we have held that the presence of the word "seal" next to an individual's signature is, standing alone, sufficient to create a sealed instrument entitled to the twelve-year statute of limitations. In *Phillips v. A & C Adjusters, Inc.*, 213 A.2d 586, 586 (D.C. 1965) we confronted a contract for the sale of an automobile where there was "no recitation in the contract

that it is signed and sealed by appellant, and no indication in the body of the contract that it is intended to be a sealed instrument;" however, "after appellant's signature, there is the printed word '(Seal)'." We concluded that "[i]n the light of *Wells v. Alropa Corp.*, 65 U.S. App. D.C. 281, 82 F.2d 887 (1936), we must hold that the contract was a sealed instrument and that the twelve year limitation is applicable." Id. at 586-87. In *Wells*, the D.C. Circuit considered a promissory note where the only indication that it was a sealed instrument was the word "Seal" printed to the right of the signature. 65 U.S. App. D.C. at 281-82, 82 F.2d 887-88. There the court relied on *Green v. Lake*, 13 D.C. (2 Mackey) 162, 172 (1882) to hold that "where a person signs his name next to the printed seal, he adopts the same as his seal, and this prevails whether or not in the body of the instrument are contained additional words 'Witness my hand and seal,' or 'signed and sealed.'" Id. See also *Amidon v. Amidon*, 280 A.2d 82, 84 (D.C. 1971) (noting but not deciding issue of whether the word "seal" typed below signatures made a separation agreement a sealed instrument for § 12-301(6) purposes). We have even held that where an individual signed a contract for services under seal and a corporation failed to physically affix its corporate seal as called for in the attestation clause, the seal of the individual made the document an instrument under seal enforceable against the corporation. *McNulty v. Medical Servs. of District of Columbia, Inc.*, 176 A.2d 783, 784 (D.C. 1962).

On the basis of the forgoing, we are compelled to hold that the proprietary lease here was a sealed instrument and that the twelve year statute of limitations is applicable.

Reversed and Remanded.[3]

[3] We decline Hampshire Gardens' footnoted invitation to affirm on the alternate basis of our recent decision in Kelley v. Broadmoor Coop. Apartments, 676 A.2d 453 (D.C. 1996) (rejecting challenge to Board of Director's imposition of restrictions on co-operative owner's right to sublet) as this issue was not fully briefed either here or below, and we do not have the entire record before us at this time.

IN THE SUPERIOR COURT

FOR THE DISTRICT OF COLUMBIA

Civil Division

RICHARD A. BURGESS, JR.

Plaintiff

vs.

SQUARE 3324 HAMPSHIRE
GARDENS APARTMENTS, INC.

Defendant : Civil No. 95-000979

ORDER

Upon due consideration of Defendant Pelkey's Motion to Dismiss filed herein and the opposition thereto,* it this 5th day of May, 1995, by the Superior Court for the District of Columbia,

ORDERED, that the Defendant's Motion be and is hereby, GRANTED, and it is further,

ORDERED, that the Amended complaint filed against defendant G. Raymond be, and is hereby, dismissed with prejudice.

* The opposition cites no authorities for its proposition that defendants can be added after the statute of limitations has run.

/s/ Mary Ellen Abrecht
Judge

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 97-CV-1473

RICHARD A. BURGESS, JR.,
Appellant,

CA 979-95

v.

G. RAYMOND PELKY, ET AL.,
Appellees.

Appeal from the Superior Court
for the District of Columbia

ON PETITION FOR REHEARING
(Filed October 26, 1999)

BEFORE: Steadman, Farrell, and Ruiz, Associate Judges

ORDER

On consideration of appellant's *pro se* petition for rehearing, it is

ORDERED that the petition for rehearing is denied.

PER CURIAM